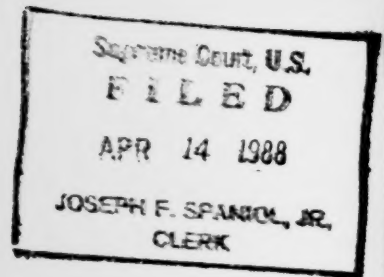


87-1803



NO. _____

IN THE SUPREME COURT OF THE UNITED STATES

October Term 1987

UNITED STATES FIDELITY & GUARANTY COMPANY

Petitioner

vs.

UNITED STATES OF AMERICA

Respondent

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

Jonathan E. Butterfield, Esquire
Counsel for Petitioner
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QUESTIONS PRESENTED

1. Does the discretionary function exception to the Federal Tort Claims Act immunize the United States from liability for damages incurred as a result of negligence in its day-to-day operations at a hazardous waste clean-up site?

2. Is the absence of any consideration by a government employee of economic, social or political policy irrelevant to a Court's determination of the applicability of the discretionary function exception to the Federal Tort Claims Act?

LIST OF PARTIES

All parties are listed in the caption. Petitioner, United States Fidelity & Guaranty Company, has no parent company, subsidiary, or affiliate which must be listed pursuant to Rule 28.1.



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IN THE SUPREME COURT OF THE UNITED STATES
October Term 1987

UNITED STATES FIDELITY	>:	
& GUARANTY COMPANY,	:	
Petitioner	:	NO.
vs.	:	
UNITED STATES OF AMERICA,	:	
Respondent	:	

**PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

Petitioner, United States Fidelity & Guaranty Company respectfully prays that a Writ of Certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on January 15, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit is reported at 837 F. 2d 116 and is reprinted in the appendix hereto, page 1a infra.

The opinion of the United States District Court for the Middle District of Pennsylvania (Muir, D.J.) is reported at 638 F. Supp. 1068 and is reprinted in the appendix hereto, p. 17a infra.

JURISDICTION

Invoking federal jurisdiction under 28 U.S.C. § 1346(b), the Petitioner brought this suit in the Middle District of Pennsylvania. On November 17, 1986, the District Court entered final judgment in favor of the Petitioner and against the United States, awarding damages in the amount of \$91,374.75. On January 15, 1988, the Third Circuit entered a judgment and opinion reversing the District Court's judgment. No petition for rehearing was sought.

The jurisdiction of this Court to review the judgment of the Third Circuit is invoked under 28 U.S.C. § 1254(1).

STATUTES INVOLVED

28 U.S.C. §2674. Liability of the United States.

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages...

28 U.S.C. §2680 Exceptions.

Provisions of this Chapter and § 1346(b) of this title [28 U.S.C. § 1346(b)] shall not apply to --

(a) any claim based upon an act or omission of an employee of the government, exercising due care in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the government, whether or not the discretion involved be abused.

STATEMENT OF THE CASE

Drake Chemicals, Inc. operated a chemical manufacturing facility in Lock Haven, Pennsylvania, from 1961 until the company went bankrupt in 1981. When Drake ceased operations, it abandoned its manufacturing site, leaving numerous chemical drums, tanks, and reactors behind. The Pennsylvania Department of Environmental Resources inspected the Drake site and determined that the site posed a threat to the public health and to the environment. After attempting unsuccessfully to have Drake clean up the site, the Department requested the Environmental Protection Agency (EPA) to undertake a clean-up operation. In February, 1982, the EPA approved the Drake site for an "immediate removal action" pursuant to its authority under the Comprehensive Environmental Response Compensation and Liability Act of 1980, 42 U.S.C. §9601-9657 (1982) (CERCLA). The EPA's clean-up operation at the Drake site was directed by an on-scene coordinator, an EPA employee, who selected OH Materials Handling Company

(OH Materials), a private chemical clean-up specialist, as the prime contractor, and numerous other EPA employees, remained at the Drake site throughout the clean-up operation. Pursuant to the terms of the contract between the EPA and OH Materials, and through the presence of EPA employees on site, the EPA retained responsibility and control for determining what work would be done, the scheduling of that work, the means and methods employed in disposing of waste, and the expenditures of OH Materials for material and manpower. The EPA retained the responsibility for public safety in connection with the operations on site, and directed and monitored the activities of OH Materials and other contractors on site.

One of the most serious hazards at the Drake site was an old railroad tank car, resting on raised concrete pedestals, and containing oleum, a form of concentrated sulfuric acid, which is extremely reactive with a wide range of compounds, including water. At the commencement of the clean-up operation, the oleum tank was venting directly into the atmosphere. The EPA was aware that the neutralization of the oleum tank posed a potential danger to the public inherent in the work, unless special precautions were taken.

OH Materials initially recommended that the tank be removed from its pedestals and transferred to a remote location, or, alternatively, placed on the ground at the rear of the Drake site prior to neutralization and removal of the oleum. This recommendation was rejected by the EPA. OH Materials then suggested neutralizing the oleum in the tank by slowly draining all of the liquid oleum from the tank through a valve at the bottom of the tank into a container of water, allowing the oleum to react with the water in a controlled fashion. The remaining sludge inside the tank would then be neutralized by slowly adding water to the tank. Following the completion of the chemical reaction, the neutralized sludge would be drained. The EPA's on-scene coordinator approved this plan.

On March 4, 1982, a hydrogeologist employed by the

Commonwealth of Pennsylvania issued a report recommending that the more hazardous operations at the Drake site, such as those involving the oleum, should be done on a sunny day with a north wind in excess of 3 knots. The reason for this recommendation was that the City of Lock Haven, with a population of approximately 15,000, is situated immediately to the north, west, and northeast of the Drake site, while areas to the south, southeast, and east of the site are sparsely populated. The on-scene coordinator was on notice of the hydrogeologist's report prior to the neutralization of the oleum tank.

On March 15, 1982, while the oleum was being drained from the tank through the bottom valve, a nut loosened and an uncontrolled flow of oleum, of approximately one quart to one gallon, dropped into the water tub below the tank. OH Materials personnel immediately tightened the valve, stopping the flow of oleum into the tank. However, the oleum hitting the water produced a dense acid cloud, which migrated off site, causing respiratory distress to five Pennsylvania Department of Transportation workers working in the City of Lock Haven. After this incident, the on-scene coordinator instructed OH Materials to continue neutralization of the oleum in the manner originally approved.

Eventually all liquid contents of the tank were drained. OH Materials then, at the direction and with the approval of the on-scene coordinator, began adding water to the tank, to neutralize the sludge. The product was then drained through the valve at the bottom of the tank. On March 23, 1982, the valve became clogged with sludge, and with the knowledge and approval of the EPA, OH Materials inserted rods through the manway at the top of the tank, seeking to clear the valve. Following the insertion of the rods, a steam explosion occurred in the tank, and a large acid cloud shot out of the manway. Blown by south-southwest winds, the acid cloud migrated into Lock Haven, causing property damage to over 500 motor vehicles, an airplane, and several buildings. Following the March 23

incident, the EPA's on-scene coordinator ordered that operations on the Drake site prone to the release of vapors would take place, henceforth, only when winds were blowing away from the city.

United States Fidelity & Guaranty Company (U.S.F. & G.), the insurer for OH Materials, paid and settled all of the claims of the public arising out of this March 23 incident. U.S.F. & G. then filed an administrative settlement claim with the EPA, which was denied. U.S.F. & G. then filed this suit against the United States on September 20, 1984, seeking recovery of its losses. The United States filed its Motion to Dismiss or for Summary Judgment on the grounds that the discretionary function exception to the Federal Tort Claims Act barred liability. This motion was denied by the District Court.

After trial, the District Court again concluded that the discretionary function exception did not apply, stating (pp33a-34a, *infra*):

Perhaps the United States could have ignored the Drake site, but once it chose to clean-up the hazardous waste there, its decisions regarding the procedures to be followed were not of the nature and quality the Congress intended to shield from tort liability. *United States v. S.A. Empresa De Viacao Area Rio Grandense (Varig Airlines)*, 104 S. Ct. 2755 (1984). The United States argues that it cannot be held liable for any incidents which occurred as a result of the initial decision to clean-up the Drake site. The results of such a broad interpretation of the discretionary function exception could lead to results which Congress did not intend. The United States must be held accountable for the acts of its workers who carry out tasks on an operational level.

The District Court then concluded that the United States, and OH Materials, had been negligent in conducting the oleum neutralization operation without taking wind conditions into account.

In conducting a clean-up of materials which would

explode and release hazardous chemicals into the air, the entities responsible for the clean-up have the duty to take all reasonable precautions so as to protect public safety...

There is no evidence that the neutralization operations would have been more dangerous had the addition of water, draining the tank, and clogging of the valve, and other procedures involved in the neutralization been delayed so as to be performed on days with favorable wind conditions. (pp. 39a-40a). *infra*

The District Court found the United States 60% responsible for the damage arising out of the March 23 incident, and OH Materials 40% responsible, and entered judgment in favor of U.S.F. & G. for 60% of the damages claimed, or a total of \$91,374.75.

The United States appealed from this judgment, and, on January 15, 1988, the Third Circuit entered an Opinion and Order, reversing the District Court on the grounds that the discretionary function exception to the Federal Tort Claims Act immunized the government in this case. According to the Third Circuit,

It is irrelevant whether the government's employee actually balanced economic, social, and political concerns in reaching his or her decision. (p. 8a, *infra*)

...The fact that there was no evidence of an actual policy determination by the on-scene coordinator taking wind conditions into account does not affect the nature of the decision. (p. 14a, *infra*.)

The Third Circuit felt that the facts of this case were sufficiently similar to *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) as to mandate the immunization of the government from liability for its employee's negligence.

REASONS FOR GRANTING THE WRIT

I. The Third Circuit's analysis of the discretionary function exception conflicts in principle with that of other Circuits.

The Circuit Courts of Appeals have differed in their readings of the implications of this Court's decision in *United States v. S.A. Empresa De Viacao Area Rio Grandense* (Varig Airlines), 467 U.S. 797, 104 S. Ct. 2755, 81 L. Ed. 2d 660 (1984). The instant case illustrates how the Third Circuit's post-Varig approach to the discretionary function exception differs from that of other Circuits, in that the Third Circuit views as irrelevant whether the government action at issue actually was the product of considerations of policy; the Third Circuit allows governmental immunity when the government's lack of provision for public safety is potentially explained by an allocation of finite governmental resources; and the Third Circuit rejects this Court's decision in *Indian Towing Company v. United States*, 350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 48 (1955) as having any continuing relevance to discretionary function analysis.

A. Relevance of the Government Actor's Actual Consideration of Policy.

The Third Circuit recognizes that the decision of this Court in *Dalehite v. United States*, 346 U.S. 15, 73 S. Ct. 956, 97 L. Ed. 1427 (1953) distinguishes between planning level decisions and operational decisions (p. 10a *infra*). Planning level decisions will always be discretionary and immunized. On the other hand, some actions on an operational level will be immunized, and others will not, depending on whether the imposition of tort liability would involve the Court in judicial second guessing of social, political, and economic policy considerations bearing on the operational act.

Acts at the operational level may be discretionary if planning level orders anticipate decisions at lower levels that leave room for policy judgment and decisions. (p. 11a *infra*.)

The Third Circuit views the governmental actions at issue in the instant case as being on the operational level, and recognizes that the government presented no evidence

that its failure to take wind direction into account was motivated by considerations of policy, citing

the fact that there was no evidence of an actual policy determination by the on-scene coordinator taking wind conditions into account (p. 14a *infra*).

However, the Court holds that

it is irrelevant whether the government employee actually balanced economic, social and political concerns in reaching his or her decision. (p. 8a *infra*).

Even though the specific operational act at issue was not motivated by policy considerations, the Court is willing to immunize the government since the action is susceptible to a policy analysis. The Court bases this view on its previous decision in *Smith v. Johns Manville Corp.*, 795 F. 2d 301 (3d Cir. 1986) and decisions from other Circuits in *Myslakowski v. United States*, 806 F. 2d 94 (6th Circuit 1986, cert. denied ____ U.S. ____, 107 S. Ct. 1608, 94 L. Ed. 2d 793 (1987); *Allen v. United States*, 816 F. 2d 1417 (10th Cir. 1987); *In re Consolidated United States Atmospheric Testing Litigation*, 820 F. 2d 982 (9th Cir. 1987), cert. denied sub nom *Konizeski v. Livermore Labs*, ____, U.S. ____, 108 S. Ct. 1076, ____ L. Ed 2d ____ (1988).

In contrast to this analysis of the discretionary function exception, the 11th Circuit, in *Alabama Electric Cooperative, Inc. v. United States*, 769 F. 2d 1523 (1985) allows for the imposition of liability against the government, based on the government's failure to demonstrate that its operational actions were actually motivated by considerations of social, economic or political policy. The Alabama Electric case concerned the erosion of downstream property caused by the Army Corps of Engineers' construction of dikes in the Alabama River. The 11th Circuit there recognizes that decisions concerning the design of a particular Corps project could be based on considerations of social, economic and political policy, entitling the government to immunity:

We hold that where the Corps make a social, economic or political policy decision concerning the design of a particular project, that decision is excepted from judicial review under § 2680(a). In the absence of such a policy decision, the Corps' design decisions are subject to judicial review under the state law tort standards that would normally govern an action for engineering malpractice.

Alabama Electric Cooperative, Inc., *supra*, 769 F. 2d at 1536-1537.

The 11th Circuit distinguishes the Alabama Electric Cooperative, Inc. case from its previous decision in *Payne v. United States*, 730 F. 2d 1434 (11th Cir. 1984), noting that in *Payne*, where the government was immunized by the Court,

the Court did consider the fact that its actions would likely cause erosion and encroachment in some areas. In *Payne*, however, the Corps made a policy decision not to determine precisely where the harm would occur, and thus the propriety of that decision is not subject to judicial review. In contrast, the District Court may find on remand in this case either that the Corps never considered the possibility that the dikes they planned to construct might adversely affect the opposite river bank, or otherwise made no policy decision not to determine the harm to the opposite bank.

Alabama Electric Cooperative, Inc., *supra*, 769 F 2d at 1535 N. 7. (emphasis in original).

The 11th Circuit thus imposes on the government the burden of demonstrating that its actions were motivated by policy considerations, in order to be entitled to immunity. In contrast, the Third Circuit will immunize the government based, not on the record before it, but on the Court's capability for hypothesizing after the fact a policy consideration which could have motivated governmental action. Obviously, the Third Circuit approach will immunize the government in more instances. While the Third Circuit's

concern, is, of course, with judicial interference in governmental policy making, it is hard to see how judicial review unduly restricts or intimidates the government employee, if no policy consideration has actually taken place.

B. Allocation of Finite Governmental Resources

The Court hypothesizes the following policy rationale for the on-scene coordinator's failure to take wind direction into account in scheduling the neutralization operation:

In this context, one would expect the scheduling decision to reflect not only the available resources and the other hazards to be neutralized on the site, but most importantly, a balancing of the risks of proceeding with the neutralization on the day chosen against the risks of further delay. (p. 13a *infra*).

The Third Circuit's grant of immunity is thus based, in part, on the hypothesis, unsubstantiated by the evidence, that the government's failure to take wind direction into account could have been motivated by a policy concern with the allocation of scarce governmental resources. Other Circuit Courts have rejected the government's contention that a failure to adequately insure public safety becomes an immunized discretionary decision by potentially implicating a policy question concerning the allocation of finite governmental resources. In *Denham v. United States*, 834 F. 2d 518 (5th Cir. 1987), a case involving an injury resulting from a dangerous condition in a federally owned swimming area, the government contended,

The decision not to check the swimming area for underwater hazards was itself discretionary and hence could not be the basis for imposing liability under the FTCA. We do not agree. The government's approach would subsume practically any decision within the discretionary function exception and thereby vitiate the FTCA. *Denham*, *supra*, 834 F. 2d at 520.

Similarly, in *Eklöf Marine Corps v. United States*, 762 F. 2d 200 (2d Cir. 1985), wherein the Court holds the government susceptible to a tort action for its alleged negligent

marking of a navigational hazard, the Court rejects the concern that allowing such actions to proceed to judgment will result in improper judicial interference with the allocation of finite resources.

Eklof Marine Corps, *supra*, 762 F. 2d at 204.

Cf. *Brown v. United States*, 790 F. 2d 199 (1st Cir. 1986), immunizing the United States from liability for its negligence in maintaining a weather observation buoy.

Certainly there are situations where the government does indeed engage in a cost-benefit analysis leading to a policy decision to accept certain risks to the public arising from its activities, in order to save expense or time or promote some other public benefit. Thus in *U.S. v. Varig Airlines*, *supra*, the FAA made a policy decision in favor of its spot check program. In *Dalehite v. United States*, *supra*, government employees decided to bag fertilizer at high temperatures after specifically considering that bagging at lower temperatures "would result in greatly increased production costs and/or greatly reduced production." *Dalehite*, *supra*, 346 U.S. at 41. In both cases, the government substantiated its contention that concern with the allocation of scarce governmental resources, and with the expeditious progress of the government activity, had explicitly motivated the challenged action. In contrast, the Third Circuit in this case is willing to immunize the government on the basis of a judge's being able to discern some increased costs to the government if the safety precautions at issue had been instituted. The exercise of due care in connection with government activities will consistently impose additional cost on the government, and the Third Circuit's approach to the discretionary function exception allows the exception to come close to swallowing the Federal Tort Claims Act.

C. Planning/Operation Dichotomy.

In the instant case, the Third Circuit indicates that the decision of this Court in *Indian Towing Company v. United States*, *supra*, is not pertinent to interpreting discretionary

function exception. In contrast, other Circuits have continued to follow the analysis suggested by *Indian Towing Company*. That test has the advantage of simplicity: The government's decision to embark upon a particular action or program is discretionary, but once it decides to act, it is obliged to do so with due care. This analysis is employed by the Second Circuit in *Caraballo v. United States*, 830 F. 2d 19 (2d Cir. 1987), see also, *Denham v. United States*, *supra*; *Eklof Marine Corps v. United States*, *supra*; Cf. *Brown v. United States*, *supra*. Thus, a conflict in principle exists among the Circuits as to the continuing validity of the planning/operational dichotomy, which was suggested in *Dalehite* and formed the basis of decision in *Indian Towing Company*.

II. The decision below, immunizing the government from liability from its operational negligence in connection with the chemical waste disposal project, raises important and potentially recurrent problems.

In *United States v. Varig Airlines*, *supra*, this Court held that the discretionary function exception immunized the government from damages allegedly resulting from the negligence of the Federal Aviation Administration, in certifying as safe an airplane which failed to comply with governmental fire protection standards. An unanimous Court there stated,

...whatever else the discretionary function exception may include, it plainly was intended to encompass the discretionary acts of the government acting in its role as a regulator of the conduct of private individuals.

United States v. Varig Airlines, *supra*, 467 U.S. at 816 (footnote omitted).

Allowing for the imposition of liability in the *Varig* situation would carry with it vast implications for governmental regulatory activity, making the government an insurer of private parties' compliance with whatever safety regulations the government might enact. If liability had been imposed on the government in *Varig*, any govern-

mental agency engaged in the promulgation of safety regulations would have to insure that it had adequate manpower to rigorously enforce the safety regulation, or face liability for private parties' noncompliance. Such liability would constitute a dramatic disincentive to governmental safety regulation.

Narrowly interpreted, the dictate of *Varig* is limited to insulating the government from liability for regulation of private activity. *Varig* differs from the instant case in that here, the government was the instigator and active director of and participant in the project causing injury, as opposed to merely being involved as a regulator of private conduct. Notwithstanding the potentially narrow applicability of *Varig*, the Third Circuit, in the instant case, has interpreted the *Varig* decision as restricting the scope of the Federal Tort Claims Act to all but the most mundane of torts such as auto accidents. In all but such mundane torts, application of the Third Circuit's analysis of the discretionary function exception will allow a judge to hypothesize some policy implications potentially underlying the decision - if nothing else, a concern with allocation of government resources. Other Courts have not seen the *Varig* decision as having substantial impact on tort claims outside the regulatory sphere. See, e.g., the concurring opinion of Judge Brown in *Collins v. United States*, 783 F. 2d 1225, at 1231 (5th Cir. 1986) (holding the United States liable for failing to reclassify a mine as gassy) wherein Judge Brown states,

The FTCA is not, as government counsel think and continue to urge, confined to the typical fender-bender automobile intersectional collision between a postal truck and a citizen's child-filled stationwagon. We still have the significant still valid decisions in *Indian Towing*, [350 U.S. 61, 76 S. Ct. 122, 100 L. Ed. 38 (1955)] *Rayonier* [*Rayonier, Inc v. United States*, 352 U.S. 315, 77 S. Ct. 374, 1 L. Ed. 22 354 (1957)] and *Eastern Airlines*, [*Eastern Airlines, Inc. v. Union Trust Company*, *aff d sub nom.*, *United States v. Union Trust Company*,

350 U.S. 907, 76 S. Ct. 192, 100 L. Ed. 796 (1955)] which recognized FTCA liability in areas traditionally thought to have some governmental activity immunity that inherently involved extensive operational judgment, and hence, "discretion."

The expansive interpretation of the discretionary function exception adopted by the Third Circuit in the instant case would preclude virtually any injury and damage claim arising out of governmental activities in the field of hazardous waste disposal. It would be a rare situation in the chemical waste disposal field where a Court, reviewing the government's failure to take adequate precautions for the surrounding citizenry, could not hypothesize some policy implications involving the more rapid completion of the clean-up task, or the minimizing of the expenditure of governmental resources. The Third Circuit's discretionary function exception analysis essentially renders those citizens injured or damaged by governmental hazardous waste clean-up activity without a remedy against the government.

This Court in *Varig* recognizes that the Court's primary concern, in interpreting the discretionary function exception, is to define congressional intent.

The basic inquiry concerning the application of the discretionary function exception is whether the challenged acts of a government employee - whatever his or her rank - are of the nature and quality that Congress intended to shield from tort liability.

Varig Airlines, *supra*, 467 U.S. at 816.

It is safe to assume that Congress, when enacting the Federal Tort Claims Act in 1946, did not consider whether governmental handling of chemical waste should be shielded from tort liability. The buildup of chemical waste in this country was not, at that time, an area of public concern or active governmental involvement. Subsequent to the enactment of the Federal Tort Claims Act, Congress has not legislatively addressed the question of the potential liability

of the United States for personal injury or property damage caused by the government's negligence in a chemical waste clean-up operation.¹

The Courts have recognized that in enacting the Federal Tort Claims Act, with the discretionary function exception, Congress was engaged in balancing the rights of the citizenry to be compensated when injured or damaged by governmental negligence against the interference with governmental decision making which could arise from the threat of tort litigation. The Congress sought to achieve this through a system which dispensed with a costly and time consuming method of private bills. See *Collins v. United States*, *supra*, 783 F. 2d at 1233.

In discussing the closely related field of judicially created immunity for discretionary acts of federal officials, this Court, in *Westfall v. Irwin*, _____ U.S. _____, 108 S. Ct. 580, at 583, 98 L. Ed. 2d 619 (1988), recognized the governmental interest in insulating "the decision making process from the harassment of prospective litigation", but further observed:

that official immunity comes at a great cost. An injured party with an otherwise meritorious tort claim is denied compensation simply because he had the misfortune to be injured by a federal official. Moreover, absolute immunity contravenes the basic tenet that individuals be held accountable for their wrongful conduct.

See also, *Forrester v. White*, _____ U.S. _____, 108 S. Ct. 538, 98 L. Ed. 2d 555 (1988).

Petitioner contends that the Third Circuit, in the instant case, adopted a mode of analysis which fails to appropriately

¹ The CERCLA statute, pursuant to which the United States undertook the Drake Chemical Clean-up, does have certain liability provisions, establishing a system of essentially strict liability for clean-up costs and damage to natural resources. However, those liability provisions are inapplicable to the present action, since this action concerns claims for private property damage. The CERCLA statute does not subject the agencies of the United States to the same potential liability as any non-governmental entity, for claims which, unlike the instant claim, fall with CERCLA's liability provisions. See 42 U.S.C. §9607(g).

balance the competing interests. When a governmental employee's failure to take appropriate precautions for the protection of the public is not actually motivated by any consideration of public policy, the immunization of the government does not serve its intended purpose. Where no policy decision has been made, immunizing the government does not protect the policy making process. The Third Circuit's decision fails to give appropriate weight to the interests of the citizenry in deterring governmental negligence, and in being compensated for losses which result from governmental negligence. The decision allows the EPA to ignore the welfare of the population residing in the vicinity of hazardous waste clean-up sites.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted. The opinion of the Third Circuit should be reversed and the case remanded to the Third Circuit for consideration of the other issues which the United States raised in its appeal below.

Respectfully submitted,

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